

SUMMARY

2022/2 Unions have no veto over employer negotiations with staff (UK)

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Legal background

Employers are prohibited by law from making offers to employees who are members of their recognised trade union(s) which, if accepted by all recipients, would mean their terms and conditions will not or will no longer be determined by collective bargaining. This outcome is known as the 'prohibited result'.

The object of this rule, set out in Section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), is to prevent employers from undermining the principle of collective bargaining. It gives effect to the 2002 ruling of the European Court of Human Rights (ECtHR) in *Wilson and Palmer – v – United Kingdom* (2002) 35 EHRR 20 that employees should not be disincentivised from enjoying collective bargaining rights. The penalty for an employer breaching Section 145B of the TULRCA is currently £4,341

per offer per affected employee.

Facts

This case arose from pay negotiations between Kostal UK Ltd (Kostal) and its recognised trade union, Unite. During the negotiations, Kostal proposed a pay deal and the union held a consultative ballot on it, in which the employees rejected the offer. To overcome the perceived impasse, Kostal decided that instead of following the remaining stages of its agreed collective bargaining procedure with Unite, it would offer the pay deal directly to its employees. Kostal warned employees that a failure to accept its offer would lead them to lose out on a Christmas bonus and a pay increase for the year.

Unite, on behalf of its affected members, argued that Kostal's actions sought to bypass the parties' agreed collective bargaining arrangement in breach of Section 145B of the TULRCA. The Employment Tribunal (ET) and the Employment Appeal Tribunal (EAT) agreed with Unite. The EAT ruled that the prohibited result occurred where offers, if accepted, resulted in a term being agreed directly rather than through collective bargaining. There was no need for a particular term to be permanently removed from the scope of collective bargaining for an offer to be unlawful.

The Court of Appeal (CA) reversed the decisions of the ET and the EAT. While accepting that the EAT's interpretation of Section 145B was possible as a matter of literal interpretation, the CA said it was extremely unlikely that parliament had intended that result as it would amount to giving trade unions a veto over even minor changes to terms of employment. This led the CA to conclude that the prohibited result does not occur if the employer makes an offer with the purpose of achieving the result that one or more terms will not, on one occasion only, be determined by collective bargaining.

Unite appealed against the CA's decision.

Judgment

The Supreme Court (SC) allowed Unite's appeal and confirmed that Kostal's actions did breach Section 145B of the TULRCA. It did so, however, on the basis that the interpretations of both Kostal and Unite, which were adopted by the courts below, had shared a common flaw. Both parties had focused on the content of Kostal's offer to each individual and not whether, if Kostal's offers had been accepted by all, this would have had a particular result. As a result, they had overlooked that the language of Section 145B is concerned not only with the content of individual offers but with the potential practical consequences of the employer's conduct, considered in the round.

The SC ruled that for offers to be capable of having the prohibited result, there must be at least a real possibility that, if they were not made and accepted, the relevant terms would have been determined by a new collective agreement reached for the period in question. If there is no such possibility, such as because an impasse has arisen in negotiations, it cannot be said that making the direct offers will have produced the result that the terms have not been determined by collective agreement for that period. In other words, it must still be possible for terms to be determined by collective bargaining in order for an offer to have the result that the terms will not be determined in that way.

It followed that Section 145B does not prevent an employer from making an offer directly to its employees, in relation to a matter which falls within the scope of a collective bargaining agreement, if it has first followed and exhausted the agreed collective bargaining procedure. Once that has been done, it cannot properly be said that, when the employer makes its offers, there is a real possibility that the matter would otherwise have been determined by collective agreement if the offers had not been made and accepted.

The result is that the effect of Section 145B is to prohibit an employer making offers directly to its employees, including union members, before it has exhausted the collective bargaining process. As Kostal had made the offers in question to its employees before doing that, the SC allowed Unite's appeal. Its members will now be entitled to receive £421,800 in compensation.

Commentary

Although Kostal was held liable for a large compensation award, this decision provides welcome clarity for employers in general. Before this decision, employers were concerned that any direct offer to members of their recognised union(s) might attract a financial penalty far higher than the value they could derive from any changes to employees' terms. This risk no longer applies, provided an employer is careful first to exhaust the agreed collective bargaining process and contemporaneously document why it believes this to have happened. Nonetheless, the potential for a trade union to call industrial action in response to an employer making direct offers remains an important risk that employers should bear in mind.

It is not surprising that the SC placed great importance on an employer following the applicable collective bargaining procedure, despite most collective agreements in the UK not being legally enforceable. As the SC recognised, the ECtHR interpreted the European Convention on Human Rights (ECHR) as meaning that trade unions often enjoy the right to a 'seat at the table' in order to be heard.

This decision does mean that unions are now likely to scrutinise in far greater detail mechanisms in collective agreements that govern what should happen if negotiations reach an impasse. Indeed, they may now push for collective agreements to include procedures that lead to binding arbitration in order to stop employers from simply exhausting a non-binding procedure and then appealing to their employees directly, over the union's head.

Finally, as Unite's members have now been successful in this case, they will not be permitted to complain about the SC's reasoning to the ECtHR. Nonetheless, it is notable that two of the five SC judges found in favour of Unite's members on the basis of the far more favourable interpretation of Section 145B for trade unions adopted by the EAT. Unions may well bring further claims in future, following an employer making direct offers only after exhausting collective bargaining, based on that reasoning. Such claims would point to the ECHR being a 'living instrument', into which the ECtHR has incrementally but consistently read an increasing scope of trade unionists' rights over time.

Comment from other jurisdiction

Germany (Susanne Burkert-Vavilova, Luther Rechtsanwaltsgesellschaft mbH): Under German law, as long as a collective bargaining agreement is in place and effective, the parties to the agreement (i.e. the members of the trade union, the members of the employers' association or – in the case of company collective agreements – the employer concluding the collective agreement itself) are bound by the collective agreement (Section 4(1) of the Collective Bargaining Act (*Tarifvertragsgesetz*, 'TVG') until the collective agreement ends (Section 3(3) TVG). Individual arrangements deviating from an effective collective agreement are not permissible, unless they are permitted by the collective agreement itself or they contain a change in the regulations to the benefit of the employee (Section 4(3) TVG). Once a collective bargaining agreement ends, its regulations however continue to apply to the parties to the agreement as long as they are not replaced by other arrangements ('after-effect' (*Nachwirkung*)) (Section 4(5) TVG). This ensures that a 'legal vacuum' does not occur between the parties for those subjects regulated under the collective bargaining agreement.

The term 'other arrangement' means *any other arrangement*. It does not necessarily have to be of a collective bargaining nature, but is usually an individual contractual agreement.

In a nutshell, if applied to this specific case, the terms of the collective bargaining agreement on pay would have continued to apply beyond the term of the

agreement. Upon the end of the term and the impasse in the negotiations on pay between the parties (and in the absence of any other applicable regime on payment) the employer could have made individual arrangements with the employees on pay and, in case of their reluctance to agree, could have served notices of change (*Änderungskündigungen*) adapting the payment terms as required. The notice of change would contain an offer to continue the employment relationship under changed conditions, so that its acceptance brings about a contract and thus a 'different arrangement'.

On a final note, in Germany, collective bargaining agreements regularly consist of a contractual and a normative part. The contractual part defines the rights and obligations of the parties to the collective agreement in relation to each other. The normative part sets labour law standards for the members of the unions, employers' associations or, in the case of company collective agreements on the employer side, for the individual employer, which have a direct and binding effect, like state laws, on the employment relationships bound by collective agreements on both sides.

Subject: Collective Agreements

Parties: Kostal UK Ltd – v – Dunkley and others

Court: Supreme Court

Date: 27 October 2021

Case number: [2021] UKSC 47

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